

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-05-0101 GEB GGH P

vs.

JOSE DELGADO-RODRIGUEZ,

Movant.

FINDINGS AND RECOMMENDATIONS

Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Movant states that he was indicted on a single count of a violation of Title 8 U.S.C. § 1326(a), being a deported alien found in the U.S., to which he pled guilty and received a 46-month sentence. Motion, p. 2.

Under Title 8 U.S.C. § 1326(a), a prison term of not more than two years is authorized for a deported alien who re-enters the United States without special permission. Id. Movant objects to the application of § 1326(b)(2), which he contends was a 1998 amendment, authorizing a maximum prison term of 20 years for any alien described in § 1326(a). Motion, p. 3. It is movant's contention that because his indictment failed to set forth any aggravated felony conviction, he could not be sentenced to more than the two years authorized by § 1326(a).

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1 § 1326. Reentry of removed aliens

2 (a) In general

3 Subject to subsection (b) of this section, any alien who—

4 **(1)** has been denied admission, excluded, deported, or removed or
has departed the United States while an order of exclusion,
deportation, or removal is outstanding, and thereafter

5 **(2)** enters, attempts to enter, or is at any time found in, the United
States, unless (A) prior to his reembarkation at a place outside the
United States or his application for admission from foreign
contiguous territory, the Attorney General has expressly consented
to such alien's reapplying for admission; or (B) with respect to an
alien previously denied admission and removed, unless such alien
shall establish that he was not required to obtain such advance
consent under this chapter or any prior Act,

9 shall be fined under Title 18, or imprisoned not more than 2 years,
10 or both.

11 (b) Criminal penalties for reentry of certain removed aliens

12 Notwithstanding subsection (a) of this section, in the case of any
13 alien described in such subsection--

14 (1) whose removal was subsequent to a conviction for commission
of three or more misdemeanors involving drugs, crimes against the
person, or both, or a felony (other than an aggravated felony), such
alien shall be fined under Title 18, imprisoned not more than 10
years, or both;

16 (2) whose removal was subsequent to a conviction for commission
of an aggravated felony, such alien shall be fined under such Title,
imprisoned not more than 20 years, or both;....

18 Petitioner recognizes the decision in Almendarez-Torres v. U.S. , 523 U.S. 224,
19 235, 118 S. Ct. 1219 (1998), governs this case but apparently seeks to have this lower court
20 overrule a Supreme Court decision on the basis of dissenting opinions. Motion, pp. 2-3. In
21 Almendarez v. Torres, a majority of Supreme Court justices found “that Congress intended to set
22 forth a sentencing factor in [§1326] (b)(2) and not a separate criminal offense.” Movant’s
23 arguments otherwise, seeking to have the court reduce his sentence to 24 months are therefore
24 unavailing and this motion should be summarily dismissed, pursuant to Rule 4(b) of the Rules
25 Governing Section 2255 Proceedings for the United States District Courts. Under Rule 4(b),
26 “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior

proceedings that the moving party is not entitled to relief....", a § 2255 motion must be dismissed.

Accordingly, IT IS RECOMMENDED that this motion be summarily dismissed, pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, movant may file written objections with the court. Such a document should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” Movant is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 11/7/06

/s/ Gregory G. Hollows

GREGORY G. HOLLOWSS
UNITED STATES MAGISTRATE JUDGE

GGH:009

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